

CalHR Case Number 14-A-0008

Request for Reinstatement after Automatic Resignation (AWOL) Permanent Intermittent
Final Decision Adopted 10/27/2014

By: Richard Gillihan, Director

PROPOSED DECISION

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge (ALJ), Department of Human Resources (CalHR) at 1:00 p.m. on September 16, 2014 in Riverside, California.

The appellant was present and self-represented. Michael J. Early, Deputy Attorney General, Department of Justice, represented the California State Lottery, respondent.

I

JURISDICTION

On January 6, 2014, the California State Lottery, respondent, notified appellant he was to be automatically separated from his intermittent appointment as a District Sales Representative because he refused to report to work after three requests. An employee may appeal the three-waiver separation on the grounds that the waivers were excusable because the employee was unable to come to work due to illness or other good reason acceptable to the appointing power.

The appellant filed a request for reinstatement appeal with CalHR on January 22, 2014. The appeal complies with the procedural requirements of California Code of Regulations, title 2, section 599.828. CalHR has jurisdiction over the appeal.

II

PROCEDURAL HISTORY

On January 27, 2014, CalHR advised the appellant he must provide a copy of his Notice of AWOL separation and a complete social security number. No information was received. On February 11, 2014, CalHR issued its 3-year closure letter pursuant to California Code of Regulations, title 2, section 599.908. Section 599.908 requires an appeal referred to CalHR be dismissed if not brought to a hearing within three (3) years unless the parties file a written stipulation specifically extending the 3-year period. On July 17, 2014, the appellant provided the necessary information and the matter was set for hearing.

III

ISSUES

1. Is appellant's refusal to report to work a waiver which results in an automatic separation from state service?

IV

FINDINGS OF FACT

The evidence established the following facts by a preponderance of the evidence.

The ALJ took Official Notice of appellant's employee work history summary prepared by the California State Controller's Office. The work history indicates that the appellant began his career as a Landscape Maintenance Worker with the California Department of Transportation on July 5, 2001. On June 3, 2002, he was appointed to the position of Compliance Representative with the Franchise Tax Board (FTB). FTB invoked the AWOL statute on November 6, 2002 automatically resigning appellant from state service.

Eleven years later, on April 9, 2013, respondent, California State Lottery, appointed the appellant to the position of District Sales Representative. He worked a Monday through Friday, 8:00 a.m. to 4:00 p.m. schedule and reported to two District Sales Supervisors and the District Manager. On October 11, 2013, the District Manager directed appellant to report to San Diego on October 14, 2013. The appellant did not report to work and did not respond to emails or telephone calls.

On October 14, 2013, respondent left a message for appellant to report to work on October 15, 2013. The appellant did not report to work and did not respond to emails or telephone calls. On October 15, 2013, respondent left a message for appellant to report to work on October 16, 2013. At approximately 7:00 a.m. on the morning he was to report to work, the appellant contacted respondent and said he had "prior engagements."

On the afternoon of October 16, 2013, the Lottery Sales Manager directed appellant to report to work in San Diego on October 17, 2013. The appellant told respondent he was unavailable to work because of a "previous commitment." On October 24, 2013, the Lottery Sales Manager left messages on appellant's state-issued cell phone and appellant's personal cell phone. The message told him to report to the San Diego

District Office on October 25, 2013. The appellant did not report to work and did not respond to telephone calls.

On January 6, 2014, respondent issued appellant its Notice of AWOL separation.

V

ANALYSIS

In addition to the provisions of Government Code section 19996.2, an intermittent employee who waives three requests by the employing department to report for work may be automatically separated from the intermittent appointment, provided that no waiver shall be counted if the employee was unable to come to work due to illness or other good reason (i.e., a reason that is acceptable to the appointing power). (Cal. Code Regs., tit. 2, §599.828.) The burden of proof is with the appellant to prove by a preponderance of the evidence he did not waive three requests to report to work. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

The appellant offered no documentary evidence to prove he did not waive three requests to report to work on October 14, 2013, October 15, 2013, or October 17, 2013. The appellant offered no credible testimonial evidence he did not waive three requests to report to work on October 14, 2013, October 15, 2013, or October 17, 2013. Respondent's evidence clearly indicated the appellant refused work on three separate occasions and did not have a reason acceptable to the appointing power. Although given ample opportunity to submit evidence, the appellant failed to explain or document his three waivers of work. By failing to produce any evidence, the appellant is unable to meet his burden of proof.

Specifically, the appellant gave no reason as to why he did not report to work as directed on October 14 or 15, 2013. On October 17, 2013, the appellant merely stated he had a "previous commitment" and therefore would not report to work. Having a "previous commitment" is not an acceptable reason for not reporting to work. An employer has a right to expect an employee to report for work unless the employee has been excused for illness or other non-medical reasons. "[A]n essential element of employment is to be on the job when one is expected to be there." (*Bettie Davis v. Department of Veterans Affairs* (1986) 792 F.2d 1111, 1113.) On October 25, 2013, the appellant failed to respond to a fourth request for work and gave no explanation for his failure to report to work.

Furthermore, the appellant is no stranger to AWOL separations. In November of 2002, another state agency, the Franchise Tax Board, invoked Government Code section 19996.2 which automatically resigned the appellant from state service for his failure to report to work. Lastly, the appellant's argument he should not have been required to work in the San Diego office is without merit or legal authority. His failure to respond to three separate requests to report to work is fatal to his appeal for reinstatement.

VI

CONCLUSIONS OF LAW

Appellant failed to meet his burden of proof he did not waive work on three separate occasions as a permanent intermittent employee of the California State Lottery, and his separation from state service is the appropriate result.

* * * * *

THEREFORE, IT IS DETERMINED, the appeal for reinstatement after automatic resignation, permanent intermittent, from the position of District Sales Representative, with the California State Lottery, effective January 6, 2014, is denied.